

BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A JUDGE, NO. 01-244
(Judge Charles W. Cope)

Case No. SC01-2670

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SPECIAL COUNSEL'S IN LIMINE MOTION TO EXCLUDE**EVIDENCE OF VICTIM'S REPUTATION OR PRIOR SEXUAL ACTIVITIES**

The Special Counsel hereby moves for an order excluding any evidence regarding (1) the reputation of the alleged victim in this case (the "Daughter"), (2) any intimate relationships between the Daughter and persons other than Judge Cope except to the limited extent such relationships were disclosed to Judge Cope or in Judge Cope's presence in Carmel-by-the-Sea, California in April 2000, (3) any details about any abortions the Daughter may have had except to the limited extent such abortions were disclosed to Judge Cope or in Judge Cope's presence in Carmel-by-the-Sea, California in April 2000, and (4) any occasion in which the Daughter was raped or otherwise sexually abused. In support thereof, the Special Counsel states:

Introduction

1. This motion asks the Hearing Panel to exclude certain evidence to prevent these proceedings from turning into a trial of the alleged victim, as opposed to a hearing on whether Judge Cope is guilty of the misconduct charged herein. As set forth below, the Florida Evidence Code provides no less than three separate rules that should lead the panel to avoid this result.

Background

2. The Daughter, a veterinarian from Maryland, is the alleged victim of Counts II,

III, and IV of the formal charges against Judge Cope. The Daughter and her mother were vacationing in Carmel-by-the-Sea at the same time that Judge Cope was attending a judicial conference there. Judge Cope walked up to them while they were sitting outside their hotel room on the evening of April 3, 2001 or early morning of April 4.

3. Count II charges that Judge Cope took their hotel room key. Count III charges that later that evening Judge Cope engaged or attempted to engage in intimate conduct with the Daughter, which was inappropriate because Judge Cope and the Daughter were intoxicated, the Daughter was in an emotionally vulnerable state, Judge Cope was representing the judiciary of the State of Florida, at least some of the conduct occurred in a public place, and Judge Cope was in California at taxpayer expense. Count IV charges that the next evening, Judge Cope used the key and attempted to break into the Daughter's hotel room.

4. Through his counsel's questioning at the Daughter's deposition and in his flurry of recent motions, Judge Cope attacks the Daughter's character in this case by trying to prove that she has a reputation of being promiscuous, that she has engaged in two prior relationships with married men, that she has had multiple abortions, and that she either was the victim of a multiple rape or falsely claims that she was. See Motion for Partial Summary Judgment at 34; Motion to Dismiss, for Discovery and for Hearing at 34-36; Motion to Dismiss Count III at 8, 16

5. To the extent any such evidence exists, it has no relevance to any of the issues in this case and thus is inadmissible under sections 90.401 and 90.402, Florida Statutes. Moreover, to the extent it has any relevance, the probative value is far outweighed by the

danger of unfair prejudice, confusion of the issues, and misleading the Hearing Panel. As such it is inadmissible pursuant to section 90.403, Florida Statutes. Alternatively, such evidence is also improper evidence of character and prior acts, which is inadmissible pursuant to section 90.404, Florida Statutes.

Evidence Is Not Relevant

6. To be admissible, any evidence must be "relevant." § 90.402, Fla. Stat. "Relevant evidence is evidence tending to prove or disprove a material fact." § 90.401, Fla. Stat.

7. The subject evidence bears no colorable relations to any material issue of fact in this case. It is immaterial to whether Judge Cope took the Daughter's key, whether and how he engaged in intimate conduct with her, or whether he attempted to break into her hotel room.

8. Judge Cope appears to contend that it is relevant to Count III to prove that he did not do anything against the Daughter's consent. This is not an issue in this case, however. This is not a criminal proceeding, and Judge Cope is not charged with sexual battery, rape, or the like. Rather, he is charged with engaging in conduct that is inappropriate for a judge regardless of the subjective thoughts or motives of the Daughter. Similarly, this is not a civil lawsuit filed to recover damages for the Daughter. Only the Daughter's objective condition that night is relevant (i.e., whether a reasonable person under the circumstances would believe that she was intoxicated and in an emotionally vulnerable state).

9. The Daughter and Judge Cope both agree that she was intoxicated that evening. (Cope Depo. vol. III at 645; Daughter's Depo. vol. I at 105-07, 209, 22, 215.) They further agree that in her intoxicated state, she confided several personal matters to Judge Cope,

including the fact that she was engaged in a relationship with a married man and had had an abortion. (Cope Depo. vol. II at 263; Daughter's Depo. vol. I at 45-46, 131.) They also agree that Judge Cope asked the Daughter to walk on the beach with him late at night to discuss these issues. (Cope Depo. vol. II at 257; Daughter's Depo. vol. I at 73-75.) They also both agree that the Daughter was looking to Judge Cope as a consoling and comforting person. (Cope Depo. vol. II at 249, 274; Daughter's Depo. vol. I at 72-73.) Judge Cope has admitted that in addition to wanting to help the Daughter with her personal problems, however, he wanted to have sex with her. (Cope Depo. vol. II at 255-56.)

10. The recollections of the Daughter and Judge Cope diverge regarding what happened on the beach. The Daughter recalls that after they had been on the beach talking for a while, Judge Cope began to try to kiss her at least three times. (Daughter's Depo. vol. I at 101-02, 191.) Each time, she turned her face away to resist his advances. (Daughter's Depo. vol. I at 102.) She does not contend that he was forceful or anything but gentle in his attempts to kiss her. (Daughter's Depo. vol. I at 117-18.) Nevertheless, she testified that after the last time she turned her head, she pushed him away and ran back to her hotel. (Daughter's Depo. vol. I at 171.)

11. Judge Cope, on the other hand, testified that the two of them mutually held hands, embraced, and engaged in "lovers kisses" on the beach. (Cope Depo. vol. II at 279.) He describes the kisses as "passion" kisses. (Id.) He further testified that he eventually led the Daughter to his hotel room (without telling her that was where he was leading her), that he offered her vodka and alcoholic lemonade to "facilitate more conversation," that she disrobed,

and that they engaged in sexual foreplay before she changed her mind and left. (Cope Depo. vol. II at 284-85, 291-92, 299-304, 327-29.)

12. There are only two disputed issues with regard to Count III, one an issue of fact, the other an issue of law. First, the Hearing Panel will need to resolve an issue of fact by determining who has the more accurate recollection, the Daughter or Judge Cope. Second, the Hearing Panel will need to resolve the issue of law by determining whether Judge Cope's conduct that night violated the Code of Judicial Conduct.

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13. None of the evidence that is subject to this motion has any bearing on material issues of fact because none of it makes it more or less likely that the Daughter's recollection is more accurate than Judge Cope's or vice versa.

14. Similarly, none of the evidence is relevant to the issue of law. Even if the evidence were probative to prove that the Daughter wanted to engage in intimate conduct with Judge Cope (which it does not as argued below), her subjective intent is irrelevant. Judge Cope is not charged with forcing the Daughter to do anything that evening. The sole question is whether his conduct was appropriate in light of the surrounding circumstances (including the Daughter's apparent intoxication and the fact that she was disclosing personal matters and seeking comfort).

15. Because the evidence does not make any material allegation of fact in this case more or less likely to be true, there is no basis for admitting the evidence subject to

¹ Count III alleges that Judge Cope violated the code regardless of which version is correct.

this motion.

Any Relevance Is Outweighed by the Risk of Prejudice

16. Even if the evidence were relevant under section 90.401, it should still be held inadmissible under section 90.403, which provides:

Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

17. The subject evidence carries a substantial risk of confusion of issues and misleading the finder of fact. The primary impact of the subject evidence, if unrebutted, would be to cast the victim in this case in a negative light and, more importantly, shift the entire focus in the trial away from the formal charges against Judge Cope and on the victim. To avoid this prejudice, the Special Counsel would have to offer evidence disproving or mitigating the myriad of allegations levied by Judge Cope against the Daughter.

18. For example, the details of the rape, which would presumably require testimony from witnesses to the rape who have no other relationship to this case, would create a trial within a trial. Similarly, litigating over what the Daughter's reputation is and whom she has dated would also require substantial evidence and testimony that otherwise has no bearing on this case. Florida courts have consistently rejected evidence of otherwise admissible prior acts by the defendant, where the evidence is likely to become "a feature, instead of an incident" in the trial. See, e.g., Ashley v. State, 265 So. 2d 685, 693 (Fla. 1972); Bush v. State, 690 So. 2d 670, 673 (Fla. 1st DCA 1997). This concern is even more important in cases such as this one, which involves evidence of acts by a witness who is not even on trial.

19. An additional reason to exclude this evidence – and to do so now before the trial begins – is that the mere threat of this evidence being offered at the trial and of the Daughter in effect being put on trial creates a substantial risk of prejudice to the prosecution. The Daughter lives in Maryland and is beyond the personal jurisdiction of Florida courts. The hearing in this case is likely to generate substantial media coverage, and the Daughter will have to balance the public need in Florida to see that its judges are properly policed and her personal, moral obligation to "do the right thing" against her own interest in protecting her reputation and avoiding the hassle and humiliation inherent in being the target of these character attacks. In short, unless the Hearing Panel grants this motion now, there will be a substantial chilling effect on the prosecution's main witness for Counts II, III, and IV. The search for the truth should not be overcome by allowing the subject evidence to be presented in the public forum of a trial.

20. Thus, the evidence is inadmissible under section 90.404.

Evidence Is Improper Character Evidence

21. Finally, even if the evidence were relevant under section 90.401 and were not otherwise inadmissible under section 90.403, it should be held inadmissible under section 90.404, which provides, "Evidence of a person's character or a trait of character is inadmissible to prove action in conformity with it on a particular occasion" with three exceptions.

22. The first two exceptions only apply in criminal cases. See § 90.403(1)(a) (regarding character of the accused); § 90.403(1)(b) (regarding character of the victim of a crime).

² Smith v. Hooligan's Pub & Oyster Bar Ltd., 753 So. 2d 596, 599 (Fla. 3d DCA 2000); Pino v. Koelber, 389 So. 2d 1191, 1195 (Fla. 2d DCA 1980); Charles W. Ehrhardt, Florida Evidence, § 404.3 at 162-63 (2000 ed.).

23. The third exception applies to the character of witnesses and allows evidence of such character only as provided in section 90.608-90.610. § 90.403(1)(c). Those provisions allow a party to impeach a witness by offering evidence of the witness's character for truthfulness or conviction of certain crimes. They clearly do not apply to the evidence offered against the Daughter's character. See Ehrhardt, Florida Evidence, § 404.7 at 175 ("past sexual behavior is not probative of truthfulness").

24. Similarly, much of the evidence subject to this motion is inadmissible under section 90.404(2). This section prohibits evidence of prior acts "when the evidence is relevant solely to prove bad character or propensity." § 90.404(2)(b), Fla. Stat. To the extent the Daughter's sex life and past conduct has any bearing at all, it could only be relevant to prove bad character or propensity.

25. Thus, the evidence is inadmissible under both parts of section 90.404.

WHEREFORE, the Special Counsel hereby moves for an order excluding any evidence regarding (1) the Daughter's reputation, (2) any intimate relationships between the Daughter and persons other than Judge Cope except to the limited extent such relationships were disclosed to Judge Cope or in Judge Cope's presence in Carmel-by-the-Sea, California in April

² If this were a criminal sexual battery case, evidence of the Daughter's prior acts and reputation would be inadmissible as a matter of law without regard to the Evidence Code. § 794.022(2), (3), Fla. Stat.

2000, (3) any details about any abortions the Daughter may have had except to the limited extent such abortions were disclosed to Judge Cope or in Judge Cope's presence in Carmel-by-the-Sea, California in April 2000, and (4) any occasion in which the Daughter was raped or otherwise sexually abused.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and regular U.S. mail to: **Louis Kwall, Esq.**, Kwall, Showers & Coleman, P.A., 133 N. St. Harrison Ave., Clearwater, Florida 33755; **Robert W. Merkle, Jr., Esq.**, Co-Counsel for Respondent, 5510 W. La Salle Street, #300, Tampa, Florida 33607-1713; **Judge James R. Jorgenson**, Chair of the Judicial Qualifications Commission Hearing Panel, 3rd District Court of Appeal, 2001 S.W. 117th Ave., Miami, Florida 33175-1716; **John Beranek, Esq.**, Counsel to the Hearing Panel of the Judicial Qualifications Commission, P.O. Box 391, Tallahassee, Florida 32301; **Brooke S. Kennerly**, Executive Director of the Florida Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, Florida 32303; **Thomas C. MacDonald, Jr., Esq.**, General Counsel to the Investigative Panel of the Judicial Qualifications Commission, 100 North Tampa Street, Suite 2100, Tampa, Florida 33602 this 4th day of June, 2002.

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